IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1805

GARLAND JEFFERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals is reported at 532 F.2d 1101, and is reprinted in Appendix A in the Petition for Writ of Certiorari.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Seventh Circuit was entered March 30, 1976. A Petition for Rehearing was denied on May 18, 1976. The Petition for a Writ of Certiorari was filed June 12, 1976. On October 4, 1976, the

Petition for Writ of Certiorari was granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

Amendment Five, Constitution of the United States of America:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

A law of the United States of America involving the crime of conspiracy, Title 21 U.S.C. §846:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

A law of the United States of America involving the crime of a continuing criminal enterprise, Title 21 U.S.C. §848:

> (a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years

> and which may be up to life imprisonment, to a fine not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).
>
> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States–
>
> (A) The profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.
>
> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if–
>
> (1) he violated any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter–
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position or organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.
>
> (c) In the case of any sentence imposed under this section, imposition or execution of such sentence

shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, sec 24-203 to 24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

QUESTION PRESENTED

Was the double jeopardy clause of the Fifth Amendment violated when the Court of Appeals, relying upon this Court's decision in *Iannelli v. United States*, 420 U.S. 770 (1975), held that there may be a conviction on a greater offense of a continuing criminal enterprise after a conviction on a lesser offense of conspiracy?

STATEMENT OF THE CASE

On March 18, 1974, Garland Jeffers was indicted in the Northern District of Indiana for two drug offenses. Jeffers was charged in Hammond Criminal 74-56 with conspiracy to distribute narcotics in violation of 21 U.S.C. §846 and in Hammond Criminal 74-57 with a continuing criminal enterprise in violation of 21 U.S.C. §848. These indictments were returned by the same grand jury. The indictments appear in the Appendix pp. 3-11.

On April 4, 1974, the Government filed a Motion for Trial Together of the two indictments and in support thereof alleged that the offenses "charged are of the same or similar character based on the same acts or transactions constituting parts of a common scheme or plan." See Government's Motion for Trial Together, Appendix pp. 12-14.

On April 29, 1974, all eight defendants in the conspiracy case, Hammond Criminal 74-56, filed objections to the trial together. See Appendix pp. 15-24.

On May 7, 1974, the trial court denied the Government's Motion for Trial Together.

In June, 1974, Jeffers and several others were convicted of conspiracy and Jeffers was sentenced to fifteen years. See Appendix, List of Important Dates, pp. 1-2.

On March 5, 1975, Jeffers attacked the pending criminal enterprise charge by filing a Motion to Dismiss which alleged double jeopardy in that Jeffers had been convicted of the lesser offense of conspiracy and therefore can't be tried on the greater offense of a criminal enterprise. See Appendix, pp. 25-32.

On March 10, 1975, the Government filed a response to the Motion to Dismiss (See Appendix pp. 33-36). The Government argued that since each offense was a distinct, separate and independent offense successive prosecutions were permissible.

On March 11, 1975, the trial court denied the Motion to Dismiss. See Appendix, List of Important Dates, etc. pp. 1-2. Jeffers was tried and convicted of a continuing criminal enterprise in March, 1975, and was sentenced to life.

The evidence presented at the conspiracy and the criminal enterprise trials differed only with regard to the proof that Jeffers received substantial income from the drug ring. The evidence was presented by several

co-conspirators and it showed that Garland Jeffers was the head of a narcotic drug ring in Gary, Indiana, from November, 1971, until March, 1974. the organization was called the "Family" and they attempted to control the drug traffic in Gary.

There has been no dispute that the conspiracy charge and the continuing criminal enterprise charge arose from the same criminal behavior of Jeffers. The Court of Appeals' opinion gives an accurate resume of the drug operations. See Petition for Writ of Certiorari, Appendix, A, pp. 2-4; *United States v. Jeffers*, 532 F.2d 1101, 1105-06.

SUMMARY OF THE ARGUMENT

Jeffers contends that a conspiracy to distribute narcotics, in violation of 21 U.S.C. §846, is a lesser included offense of a continuing criminal enterprise. The reason is that the definition of a continuing criminal enterprise, 21 U.S.C. §848, provides that there must be a series of drug violations "which are undertaken by such person *in concert* with five or more other persons." Jeffers argues that since concerted action is required there is, by definition, a conspiracy.

Jeffers contends that his multiple prosecutions violate the double jeopardy clause of the Fifth Amendment. That Jeffers' conviction on the lesser included offense of conspiracy bars his subsequent prosecution on the greater offense of a continuing criminal enterprise. The Double Jeopardy Clause prohibits successive prosecutions for the same crime, and that a lesser included prosecution bars the prosecution on the greater.

Jeffers argues that *Iannelli v. United States*, 420 U.S. 770 (1975) has been misinterpreted by the Seventh Circu *Iannelli* did not abolish the lesser included offense rule for determining the application of the

double jeopardy rule to complex statutory crimes. *Iannelli* was basically a punishment case; that is, separate punishments were permitted for a §371 conspiracy conviction and a §1955 gambling conviction. This Court specifically stated that these two crimes required different elements and the traditional *Blockburger* rule didn't apply. Jeffers argues that this case is a dual prosecution case, and that Congressional intent to punish must always be constrained by constitutional prohibitions.

Jeffers argues that there was no valid waiver of his double jeopardy rights. The objections to the trial together were based on an attempt to obtain a fair trial. Jeffers may not be forced to waive Fifth Amendment rights in seeking to exercise Sixth Amendment Rights to a fair trial.

ARGUMENT

A. Conspiracy is a lesser included offense to a continuing criminal enterprise.

The first determination that must be made is whether or not a conspiracy to distribute narcotics, chargeable under §846, is a lesser included offense of a continuing criminal enterprise. The statutory definition of a continuing criminal enterprise specifically requires that the person undertake his enterprise "in concert with five or more other persons." 21 U.S.C. §848(b)(2)(A). Webster's New Collegiate Dictionary, copywrited in 1974, defines "concert" as an "agreement in design and plan; union formed by mutual communication of opinion and views." If Jeffers is charged with running a drug ring while he is "in concert" with five or more other people, it would defy logic to say there is no agreement. If there is an agreement,

there is a conspiracy. Conspiracy can be defined as a combination between two or more persons by concerted action to accomplish a criminal or unlawful purpose. *Pinkerton v. United States*, 151 F.2d 499 (5th Cir.), affirmed 328 U.S. 640 (1946); *United States v. Amedeo*, 277 F.2d 375 (3rd Cir. 1960). In the continuing criminal enterprise trial, the court gave a conspiracy instruction that used this definition. See Court Instruction No. 33, Appendix pp. 46-48.

Since a continuing criminal enterprise requires proof of a conspiracy as one of its elements, Jeffers argues that this satisfies the traditional definition of a lesser included offense. Basically, there are two requirements to have a lesser included offense. First, the lesser offense involves fewer of the same constituent elements as the greater offense. See *Berra v. United States*, 351 U.S. 131 (1956) and *Sansone v. United States*, 380 U.S. 343 (1965). Secondly, the two offenses must contain common elements; that is, the greater offense cannot be committed without also committing the lesser. See *Olais-Castro v. United States*, 416 F.2d 1155 (9th Cir. 1969) and *Kelly v. United States*, 370 F.2d 227 (C.A.D.C. 1966), cert. denied, 388 U.S. 913. A continuing criminal enterprise requires an element of concerted action, i.e. conspiracy, and thus if the evidence proves a criminal enterprise a conspiracy must be proven. It is impossible to commit a continuing criminal enterprise without having a conspiracy.

It must also be noted that the Seventh Circuit expressly found that a conspiracy was a lesser included offense. The Seventh Circuit stated:

> Conspiracy to distribute narcotics falls within the definition of a lesser included offense of continuing criminal enterprise. The elements of a continuing criminal enterprise include, inter alia, that the accused engaged in a continuing series of violations of the Controlled Substances Acts which

> are undertaken *in concert* with five or more other persons with respect to whom the accused occupies some supervisory position. Since a criminal enterprise charge requires proof that the accused acted *in concert* with five or more persons, it requires proof of a conspiracy. (Emphasis in opinion; see Petition for Writ of Certiorari, Appendix A, pp. 7-8; *United States v. Jeffers*, 532 F.2d 1101, 1106-07.)

B. If a conspiracy is a lesser included offense Jeffers cannot be prosecuted on the lesser offense and then on the greater.

Jeffers' position is simply stated:

> . . . (A) conviction of a lesser offense bars a subsequent prosecution for a greater offense in all those cases where the lesser offense is included in the greater offense, and vice versa. 1 Wharton's Criminal Law and Procedure (Anderson, 1957), §135, pp. 294-295.

Jeffers is complaining he has been subjected to multiple prosecutions and that such prosecutions violate the double jeopardy clause of the Fifth Amendment. In *United States v. Ball*, 163 U.S. 662, at 669 (1896), this court said:

> The Constitution of the United States, in the Fifth Amendment, declares "nor shall any person be subject (for the same offense) to be twice put in jeopardy of life or limb." The prohibition is not against twice punished, but against being twice put in jeopardy.

This basic constitutional principle was rephrased by this Court in *Green v. United States*, 355 U.S. 184 at 187 (1957):

> The underlying idea, one that is deeply engrained in at least Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjected him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, . . .

Petitioner would argue that this court has indicated that the lesser included offense rule is part of the double jeopardy protection. In *Robinson v. Neil*, 409 U.S. 505 (1973), this court was faced with a habeas corpus appeal. Robinson had been convicted of assault and battery in violation of a Chattanooga City Ordinance. Robinson was sentenced on this conviction. Subsequently Robinson was charged with assault with intent to murder and was tried, convicted, and imprisoned. Robinson sought a federal writ of habeas corpus challenging the second conviction as being in violation of his double jeopardy rights. When the case finally reached this Court, Robinson's claim was remanded to the district court for a determination if the charges were "the same" as required by the double jeopardy rule. It was obvious that the charges were not identical, that is, literally the same. The first conviction was for assault and battery, and the second was for assault with intent to murder. On remand, the district court made a detailed analysis of the standard to be applied in determining whether the charges were for the same offense. See *Robinson v. Neil*, 366 F.Supp. 924 (E.D. Tenn. 1973). The district court applied the "same evidence" test as adopted by this court in *Blockburger v. United States*, 294 U.S. 299 (1932). The rule set forth in *Blockburger* for determining if the offenses are the same is:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct

> statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.
>
> * * * * *
>
> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. (284 U.S. at 304)

The district court found that Robinson's second prosecution was double jeopardy; the court stated:

> In the present case, conviction of the greater offense requires proof of an additional fact, i.e., intent to commit murder, but, by definition, the lesser offense does not include an additional element. Bearing in mind that the "same evidence" test requires that each offense must entail the "proof of an additional fact which the other does not" to render the defense of double jeopardy unavailable, it becomes apparent that a conviction of a lesser included offense bars a subsequent prosecution for the greater offense. (Citation of authority omitted.)
>
> * * * * *
>
> As stated by Judge Miller in *United States v. Engle*, 458 F.2d 1021 at 1025 (6th Cir. 1972):
>
> "(The double jeopardy clause) is intended to prevent vexations, piecemeal prosecution whether the result of an intent to harass, a desire to have more than one shot at obtaining a conviction or severe sentence, a mere prosecutorial caprice or carelessness."
>
> If the State were allowed to initiate separate prosecutions against a defendant for every crime up the ladder from the lesser to the greater offense, the potential for abuse and oppression would be

too great to be tolerated in a society concerned for the rights of the individual. The double jeopardy clause stands as a bar to such a potential.

* * * * *

It is clear that the Constitution prohibits the trial of a person for the offense where he has been previously charged with and convicted of a lesser included offense arising out of the same act or activity.

* * * * *

The decision reached herein does not impose an undue hardship on the State. It merely requires that the prosecution of individuals accused of criminal activity be managed in such a way that those individuals are not forced to climb a ladder of multiple criminal prosecutions from the 'least' included offense to the greatest. *Robinson v. Neil*, 366 F.Supp. at 927, 928, 929.

Under the reasoning cited in *Robinson*, Jeffers argues that his conviction of conspiracy, as a lesser include offense, bars subsequent prosecution for a criminal enterprise.

C. Government has argued that the conspiracy and the substantial offense can be prosecuted separately.

The Government throughout this case has argued that there may be separate prosecutions for the conspiracy and the substantive offense. This rule and its rationale has been stated by this Court in *Pereira v. United States*, 347 U.S. 1 (1954):

> The Petitioners alleged that their convictions on both the substantive counts and the conspiracy to commit the crimes charged in the substantive counts constituted double jeopardy. It is settled

law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. *Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy.* The substantive offenses with which petitioners were charged do not require more than one person for their commission; either could be accomplished by a single individual. The essence of the conspiracy charge is an agreement to use the mails to defraud and/or to transport in interstate commerce property known to have been obtained by fraud. *The defendants' conviction on the substantive counts does not depend on any agreement, he being the principal actor.* Thus the charge of conspiracy requires proof not essential to the convictions on the substantive offenses–proof of an agreement to commit an offense against the United States–and it cannot be said that the substantive offenses and a conspiracy are identical, any more than that two substantive offenses are identical. (Emphasis supplied) 347 U.S. at 11.

The policy reason for this rule is that most substantive offenses do not require a conspiracy as an essential element. This Court has acknowledged that if a substantive offense does in fact require a conspiracy, then there could not be multiple prosecutions. In *Pinkerton v. United States*, 328 U.S. 640 (1946), this court was faced with a question of whether multiple punishments could be imposed on convictions for conspiracy and the substantive offense. The *Pinkerton* court found multiple punishment permissible, but acknowledged that there could be a situation in which it would not be. The Court stated:

> Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. (Citations omitted; 328 U.S. at 643).

The basic policy reason for allowing separate prosecutions for the substantive crime and a conspiracy is that "collective criminal agreement–partnership in crime–presents a greater potential threat to the public than individual delicts." *Callanan v. United States*, 364 U.S. 587, at 593 (1961). "It has ingredients, as well as implications, distinct from the completion of the unlawful project." *Pinkerton v. United States*, supra, 328 U.S. at 644. "Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality." *Callanan v. United States*, supra, 364 U.S. at 593.

Jeffers argues that the multitude of cases permitting separate prosecutions and the policy reasons are not controlling. The reason is that none of these cases involved a substantive offense that required a conspiracy as an essential element. When Congress enacts a sanction for a crime that requires concerted activity, it should be presumed that Congress has taken into consideration the evils of the concerted activity. See 29 Southwestern Law Journal 783, at 784 (1975). Jeffers argues that the statutory scheme involved herein shows an intent that there should be one prosecution and punishment for a continuing criminal enterprise and its underlying conspiracy. Congress has provided harsh penalties for a continuing criminal enterprise thereby acknowledging the evils of the concerted action. For the first offense the defendant may be sentenced from

10 years to life, fined up to $100,000, and have the profits from the drug ring forfeited. See 21 U.S.C. §848(a). This is a much heavier penalty than is provided for conspiracy to distribute narcotics; this penalty is up to fifteen years. See 21 U.S.C. §841 and 846. It therefore follows that the continuing criminal enterprise penalty included the penalties for the underlying conspiracy. Thus, a conspiracy prosecution and penalty should not be added on the substantive crime. This rule has been tacitly approved by this Court. *Pinkerton v. United States*, 328 U.S. 640 (1946) and *Gebardi v. United States*, 287 U.S. 112 (1932). See also *United States v. Cogan*, 366 F.Supp. 374, at 377 (S.D.N.Y. 1967). When the penalties for the substantive offense are sufficient to cover an included conspiracy crime, there can not be separate prosecutions.

D. Iannelli v. United States has not created a new double jeopardy rule.

The Court of Appeals decision (Petition for Writ of Certiorari, Appendix A. pp. 11-19; *United States v. Jeffers*, 532 F.2d 1101, 1106-11) acknowledged the validity of the lesser included offense rule, but held that "this rather mechanical analysis" should not control the case. The Court of Appeals went on to make an analysis of *Iannelli v. United States*, 420 U.S. 770 (1975), finding that Iannelli had created a new criterion for double jeopardy. The Court of Appeals viewed Iannelli as allowing multiple prosecutions for highly complex statutory crimes without the restraints of the lesser included offense rule. The Court of Appeals stated:

> The double jeopardy contention (in Iannelli) was passed over in a footnote, id. at 785 n. 17, and the theme of the opinion (Iannelli) seems to be

that at least in the area of complex statutory crime, if Congress intends that two offenses be retained as independent offenses, prosecution under both is permissible. (532 F.2d at 1108.)

* * * * *

In regard to highly complex statutory crime, however, the included offense tests are often not appropriate to determine whether two offenses should be classed as "the same" because often, even though these offenses meet the included offense test, they are direct at quite different results. (532 F.2d at 1110.)

* * * * *

From this analysis, then, we conclude that the conspiracy charged in the first indictment and the continuing criminal enterprise charged in the second indictment were not the "same offense" for double jeopardy purpose, and a prior conviction in the first indictment did not bar prosecution on the second. (532 F.2d at 1111.) (Petition for Writ of Certiorari, Appendix A. pp. 11, 15, 18-19)

Jeffers argues that this Court's decision in Iannelli did not establish a new double jeopardy rule.

In *Iannelli* the question was presented of whether an individual could be convicted of a §371 conspiracy and a §1955 gambling offense. This Court discussed the traditional Wharton's Rule and whether it was applicable to Iannelli. The two prosecutions were permitted to stand. Petitioner points out that the §1955 gambling charge did not require a conspiracy. 18 U.S.C. §1955 defines an illegal gambling business; it "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business." See 18 U.S.C. §1955(b)(1)(ii). Since a conspiracy was not required in the gambling offense, the lesser included offense doctrine did not come into issue. The Court discussed this in detail:

The essence of the crime of conspiracy is agreement, see e.g., *Pereira v. United States*, 347 U.S. 1, 11-12 (1954); *Braverman v. United States*, 317 U.S. 49, 53 (1942); *Morrison v. California*, 291 U.S. 82, 92-93 (1934), an element not contained in the statutory definition of the §1955 offense. In a similar fashion, proof of violation of §1955 requires establishment of a fact not required for conviction for conspiracy to violate that statute. To establish violation of §1955 the prosecution must prove that the defendants actually did "conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business." 18 U.S.C. §1955(a). The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy. See *Yates v. United States*, 354 U.S. 298, 333-334 (1957); *Braverman*, supra. (420 U.S. at 785, n. 17.)

* * * * *

But the §1955 definition of "gambling activities" pointedly avoids reference to conspiracy or to agreement, the essential element of conspiracy. Moreover, the limited §1955 definition is repeated in identifying the reach of §1511, a provision that specifically prohibits conspiracies. Viewed in this context, and in light of the numerous references to conspiracies throughout the extensive consideration of the Organized Crime Control Act, we think that the limited congressional definition of "gambling activities" in §1955 is significant. The Act is a carefully crafted piece of legislation. Had Congress intended to foreclose the possibility of prosecuting conspiracy offenses under §371 by merging them into prosecutions under §1955, we think it would have so indicated explicitly. It chose instead to define the substantive offense punished by §1955 in a manner that fails specifically to invoke the

concerns which underlie the law of conspiracy. (420 U.S. at 786.)

Thus in *Iannelli* dual convictions were permitted for the basic reason that the gambling violation did not require concerted action, and therefore the two crimes were separate and distinct.

The Court of Appeals in discussing *Iannelli* missed this finding. The Seventh Circuit felt that there had to be "some sort of concerted activity", and this would amount to a conspiracy. (Petition for Writ, Appendix A. p. 12; 532 F.d at 1108.) Also, the Court stated that "by a traditional analysis, the conspiracy charge is a lesser included offense of the substantive charge under §1955." (Petition for Writ, Appendix A., p. 13; 532 F.2d at 1109.) Jeffers argues that the Seventh Circuit's confusion on this point is the crux of this case. If *Iannelli* had specifically said that the lesser included offense rule was no longer valid then Jeffers would have no argument. *Iannelli* did not do so. Since it is clear that *Iannelli* did not find a conspiracy was a lesser offense of a §1955 gambling offense, there can be no valid claim that *Iannelli* created a new double jeopardy rule. Justice Powell in *Iannelli* acknowledged the limits of the case by commenting that the statutory elements of the crimes are the factors in determining whether the crimes are merged under the Wharton's rule or the same evidence test of *Blockburger*. (420 U.S. at 785, n. 17 and 18.) Jeffers argues that the Court of Appeals has improperly applied the *Iannelli* holding.

If the statutory elements of a continuing criminal enterprise are examined the requirement of concerted action is evident. 21 U.S.C. §848(b)(2)(A) defines a continuing criminal enterprise as a series of drug violations "which are undertaken by such person *in concert* with five or more other persons." This definition removes any question as to whether a

conspiracy is required. Congress, by adding the phrase "in concert", has made it clear that a continuing criminal enterprise involves a conspiracy. The conspiracy charge and the continuing criminal enterprise filed against Jeffers were made under the Drug Abuse, Prevention and Control Act of 1970.

Part D. of the Act provides for the legislative scheme of offenses and penalties. A brief outline of the various sections is:

§841–unlawful distribution–up to 15 years
§842–improper actions of a registrant - civil penalty
§843–improper distribution by a registrant; use of a forged prescription, etc., use of a communication facility to commit a felony - up to 4 years.
§844–simple possession - up to one year
§845–distribution to persons under twenty-one - up to 30 years
§846–conspiracy - up to maximum time for the offense
§847–additional penalties - all in addition to any other civil or administrative penalty
§848–continuing criminal enterprise - 10 years to life
§849–special drug offenders - up to 25 years
§850–information for sentencing
§851–proceedings to establish prior convictions

All of these laws were enacted in 1970 as Public Law 91-513. Jeffers argues that these sections show a stair step approach in drug offenses. The continuing criminal enterprise is the top of the offenses. A continuing criminal enterprise is simply a conspiracy that is super successful. The closeness of the conspiracy prohibition, §846, to the continuing criminal enterprise, §848, indicates the Congress was aware of both crimes and their definitions. In light of the statutory elements of a continuing criminal enterprise, the lesser included

offense rule would have to come into play. When Congress specifically included conspiracy in its definition, Jeffers is automatically protected from multiple prosecutions for conspiracy and a continuing criminal enterprise.

The Seventh Circuit attempted to avoid the lesser included offense rule by citing nebulous policy considerations. First, the Court contended that the complexity of criminal legislation warranted the abandonment of the constitutional protective. Petition for Writ of Certiorari, Appendix A, p. 15; *United States v. Jeffers*, 532 F.2d 1101, at 1110. No authority was cited. The Court of Appeals argued that the conspiracy and continuing criminal enterprise were aimed at different results and that this justified a double jeopardy change. A continuing criminal enterprise is different from a conspiracy in that it requires other elements in addition to concerted action. This does not mean that it is a different crime for purposes of determining double jeopardy rights. The statutory scheme outlined above does not make each crime a completely separate offense; that is, each crime does not have an element that the others do not. The statutory pattern is to provide heavier sanctions for the more serious drug offenders. But this must be done within the protections afforded by the double jeopardy clause. This court has already established a criterion for a double jeopardy determination and that is whether or not a continuing criminal enterprise can be committed without a conspiracy. To hold that this is not the criterion this Court would have to reverse *Blockburger* and subsequent cases. The Seventh Circuit's emphasis on the complexity of criminal legislation does not change the existing constitutional standard for double jeopardy.

The Seventh Circuit also justified an abandonment of the traditional double jeopardy rule because of the

difficulty prosecutors would have in knowing that crimes were included in others. The Court stated in a footnote:

> The included offense theories, if applied to complex statutory crimes, create hypertechnical classifications for offenses, which catch prosecutors off guard by holding offenses which would not normally be considered similar "the same." (Petition for Writ, Appendix A, p. 19, n. 12; 532 F.2d at 1111, n. 12.)

Petitioner argues that a prosecutor's ineptness is not justification for the abandonment of a constitutional right. Jeffers is still protected against the "embarrassment, expense, and ordeal" of successive trials. *Green v. United States*, 355 U.S. 184, at 187 (1957).

Finally, Jeffers would point out to this Court that this is not a case of multiple punishments but a case of multiple prosecutions. Jeffers suggests that congressional intent is the relevant inquiry on the question of multiple punishment, that is, did Congress sufficiently show indication that it desired punishment for both offenses. Congressional intent does not resolve multiple prosecution problems. Jeffers' multiple prosecutions must be reviewed in light of Fifth Amendment prohibitions and not congressional intent. Congressional intent may not supercede constitutional rights. *Iannelli* was a congressional intent case; Jeffers is a Fifth Amendment case. The Seventh Circuit has taken the position that congressional intent can abolish fundamental constitutional rights. This is not so. All criminal prosecutions are subject to the constraints of our constitution and these basic rights can not be legislated away.

E. Jeffers has not waived his double jeopardy rights by objections to a trial together.

Jeffers and the other defendants in the conspiracy case filed objections to the government's request to have the conspiracy and the continuing criminal enterprise charges tried together. The government has argued that this amounts to a waiver of Jeffers' constitutional right against double jeopardy. Jeffers contends that he was entitled to a full and fair trial. *Ponzi v. Fessenden*, 258 U.S. 254 (1922). Therefore, if Jeffers objected to the joint trial it was to perserve his constitutional right to a fair trial. Jeffers argues that he can't be required to waive one constitutional right in order to exercise another. The government would give Jeffers the choice between a prejudicial joinder in one trial, or multiple prosecutions. That is, Jeffers could avoid prejudicial joinder but would have to give up Fifth Amendment rights to do so.

This argument runs against this Court's ruling in *Simmons v. United States*, 390 U.S. 377 (1968). A defendant had filed a Motion to Suppress Evidence on the basis of a violation of Fourth Amendment rights. The defendant had to take the witness stand in order to establish his right to assert his Fourth Amendment rights. The defendant lost his pre-trial motion and his testimony was sought to be used against him at his trial. This Court held that when a defendant exercises a constitutional right, he cannot be held to have waived other constitutional rights. And therefore testifying at a Fourth Amendment hearing is not a Fifth Amendment waiver. This Court stated:

> . . . Thus, in this case Garrett (defendant) was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testified in support of a Motion to Suppress Evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. (390 U.S. at 394, 88 S.Ct. at 976.)

Jeffers contends that *Simmons* prohibits a valid waiver; no penalty can be attached to the exercise of a constitutional protected right. *Simmons* has been followed in other circumstances. In *Davis v. Wainwright*, 342 F.Supp. 39 (M.D. Fla. 1971), the defendant was required to take the witness stand and make incriminating statements in order to obtain court appointed counsel. The Court in relying upon *Simmons* held there was no valid Fifth Amendment waiver because the Defendant was attempting to obtain the services of counsel. In *United States v. Harrison*, 461 F.2d 1127 (5th Cir. 1972) testimony given by a defendant at a pre-trial hearing on a Motion to Suppress a confession was held inadmissible at the trial. In *United States v. Sherpix, Inc.*, 512 F.2d 1361 (C.A.D.C. 1975), the Court held that an appearance at a prior adversary hearing on the issue of obscenity would not be admissible at the trial. Attempted protection of First Amendment rights will not waive Fifth Amendment rights. All of these cases prevent the waiver of valid constitutional rights by the exercise of other constitutional rights. Thus, Jeffers' attempt to obtain a fair trial cannot be held to waive his Fifth Amendment rights against double jeopardy.

Jeffers would further argue that waiver of constitutional rights is not lightly to be inferred; courts must indulge in every reasonable presumption against waiver

of fundamental constitutional rights. *Emspak v. United States*, 349 U.S. 190 (1955). There must be an intentional relinquishment of a known right before there can be a valid waiver. *Johnson v. Zerbst*, 304 U.S. 458 (1938). At the time Jeffers objected to the trial together there was no certainty that the government would proceed to try him in two trials. A waiver of Fifth Amendment rights simply cannot follow from these happenings.

CONCLUSION

Jeffers' conviction for a continuing criminal enterprise must be reversed as being in violation of the Fifth Amendment protection against double jeopardy.

Respectfully submitted,

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